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9
10 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

11 STANLEY WITHOUSKI, individually and
12 on behalf of all others similarly situated,

13 Plaintiff,

14 vs.

15 ROBINHOOD FINANCIAL LLC,
ROBINHOOD MARKETS, INC.,
ROBINHOOD SECURITIES, LLC,
16 and DOES 1 through 20, inclusive,

17 Defendants.

18 Case No. 3:20-cv-3550-JD

19 **Plaintiff's Notice of Motion
and Motion to Remand Action;
Memorandum of Points and
Authorities in Support Thereof**

20 Date: August 6, 2020
21 Time: 10:00 a.m.
22 Courtroom: 11, 19th Floor
23 Judge: Honorable James Donato

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED

3 The Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) prohibits
4 “artful pleading” of securities-fraud class actions in state court designed to evade federal
5 jurisdiction — the stricture of the Private Securities Litigation Reform Act of 1995
6 (“PSLRA”) (e.g., the requirement to plead scienter with particularity). This so-called
7 “SLUSA bar” has a “broad, *but not unlimited*, scope.” *Spielman v. Merrill Lynch, Pierce,*
8 *Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003) (emphasis in original). Indeed, as
9 the Ninth Circuit held in *Walling v. Beverly Enterprises*, “[n]ot every breach of a stock
10 sale agreement adds up to a violation of the securities law.” 476 F.2d 393, 397 (9th Cir.
11 1973). In *Chadbourne & Parke LLP v. Troice*, the Supreme Court limited SLUSA’s reach
12 — and the “in-connection-with” requirement — to cases involving an alleged fraud that is
13 “material to a decision to ... buy or sell a ‘covered security.’” 571 U.S. 377, 387 (2014).

14 Here, plaintiff brought this class action against an online stock brokerage firm,
15 asserting California state-law claims (negligence, breach of contract, and the like) arising
16 from the firm's day-long system crashes that prevented customers from accessing their
17 online accounts and making stock trades.

The issue to be decided on this motion to remand is:

- By alleging that defendants failed to maintain, as promised, a high-tech, reliable online trading system, are plaintiff's claims based on alleged misrepresentations or omissions in connection with the purchase or sale of covered securities?

23 | Put differently:

- Is the SLUSA bar so unlimited, and can the “in-connection-with” requirement be interpreted so broadly, as to preclude plaintiff’s claims based on being prevented from accessing his account and trading covered securities?

II. PRELIMINARY STATEMENT

Circuit precedent requires that the Court answer “no” to the questions above and remand this action. In *Fleming v. The Charles Schwab Corp.*, the Ninth Circuit held that the SLUSA bar does not preclude a customer’s claim for breach of duty by a stock brokerage firm, like the Robinhood defendants here,¹ on the basis that “its trading systems crashed.” 878 F.3d 1146, 1154 (9th Cir. 2017). This is exactly what plaintiff alleges here. Stanley Withouski is a Robinhood customer. ¶ 16.² He alleges that he and other class members — all California residents — entered into a Customer Agreement with Robinhood, under which they agreed to use Robinhood’s website and application (“app”) to trade stocks and other financial instruments. ¶¶ 3, 58. On March 2 and 3, 2020, however, Robinhood’s website and app crashed, leaving plaintiff and other class members with no access to their accounts. To recover damages resulting from being prevented from trading due to Robinhood’s system crashes, plaintiff brought this action in state court, alleging common-law claims (e.g., negligence and breach of contract) and violations of California’s consumer-protection statutes.

Plaintiff's claims do not arise from fraud — much less from any “manipulative or deceptive device” design to inflate the price of any security. Neither misrepresentations nor omissions form the factual predicate of plaintiff's state-law claims. Absent this factual predicate, Robinhood cannot justify the removal of this action.

Nor can the “in-connection-with” requirement be satisfied because, under *Troice* and circuit precedent, any misrepresentation or omission on the part of Robinhood must be material to the decision to purchase or sell a “covered security.” Any misrepresentations or omissions alleged in the complaint pertain to Robinhood’s

¹ Defendants are Robinhood Markets, Inc. and its two wholly-owned subsidiaries, Robinhood Financial LLC and Robinhood Securities, LLC (collectively, "Robinhood").

² The allegations in Withouski's April 20, 2020 complaint (Dkt. No. 1 at 10–27), filed in the Superior Court of California, County of San Mateo, are cited as "¶ ."

1 inducement of plaintiff to use its services — not to any security transactions. Robinhood's
 2 removal is thus improper.

3 Accordingly, this Court should grant plaintiff's motion and remand this action.

4 **III. STATEMENT OF FACTS**

5 **A. Robinhood's Two-Day System Crashes**

6 This action arises from Robinhood's system crashes on March 2 and 3, 2020 that
 7 left customers without access to their accounts and prevented them from trading during
 8 the largest daily point gain in the Dow Jones' history. Founded in 2013, Robinhood is an
 9 online broker-dealer. ¶¶ 17–19. Proclaiming to be "a pioneer of commission-free
 10 investing," Robinhood provides an online platform for customers to use its website, app,
 11 and telephone help center to trade stocks, options, exchange-traded funds, and
 12 cryptocurrency. ¶¶ 3, 23. To attract customers, Robinhood touts its "[e]xceptionally
 13 engineered systems" and "[s]implicity." ¶ 3.

14 But fundamental defects in Robinhood's capabilities and trading platform were
 15 revealed on March 2 and 3, 2020, when its system crashed — preventing customers from
 16 logging in, trading, or accessing their accounts as stock markets surged. ¶¶ 4, 34–36.
 17 These complete service outages caused by the system crashes were devastating to
 18 Robinhood's customers who planned to make trades during one of the largest market
 19 surges of all time. *See id.*

20 **B. Plaintiff's Claims**

21 Seeking damages and injunctive relief on behalf of himself and all Robinhood
 22 customers residing in California (¶ 37), plaintiff asserts eight state-law claims: (1)
 23 declaratory relief; (2) negligence; (3) breach of fiduciary duty; (4) breach of contract, (5)
 24 breach of the implied covenant of good faith and fair dealing; (6) unjust enrichment; (7)
 25 violations of California's Consumer Legal Remedies Act ("CLRA"), CAL. CIV. CODE §§ 1750,
 26 *et seq.*; and (8) violations of the Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE
 27 §§ 17200, *et seq.* ¶¶ 40–84.

1 Plaintiff filed his complaint on April 20, 2020 in the Superior Court of California,
 2 County of San Mateo. *See* Dkt. No. 1 at 10–27. Robinhood removed the action to this Court
 3 on May 27, 2020.

4 **IV. LEGAL STANDARD**

5 **A. Removal Jurisdiction**

6 The removal jurisdiction of the federal courts is derived entirely from the statutory
 7 authorization of Congress. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109
 8 (1941). “Principles of federalism, comity, and respect for the state courts also counsel
 9 strongly in favor of scrupulously confining removal jurisdiction to the precise limits that
 10 Congress has defined.” *California v. AbbVie Inc.*, 390 F. Supp. 3d 1176, 1180 (N.D. Cal.
 11 2019) (Donato, J.) (citing *Shamrock*, 313 U.S. at 109). Thus, all “removal statutes are
 12 strictly construed against removal,” *Luther v. Countrywide Home Loans Servicing LP*,
 13 533 F.3d 1031, 1034 (9th Cir. 2008), and “[f]ederal jurisdiction must be rejected if there
 14 is any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d
 15 564, 566 (9th Cir. 1992).

16 “The ‘strong presumption’ against removal jurisdiction means that the defendant
 17 always has the burden of establishing that removal is proper.” *Id.* at 566. “If at any time
 18 before final judgment it appears that the district court lacks subject matter jurisdiction,
 19 the case shall be remanded.” 28 U.S.C. § 1447(c). Thus, “any doubt about the right of
 20 removal requires resolution in favor of remand.” *Moore-Thomas v. Alaska Airlines, Inc.*,
 21 553 F.3d 1241, 1244 (9th Cir. 2009); *see also AbbVie*, 390 F. Supp. 3d at 1180 (same)
 22 (citing *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1034 (9th Cir.
 23 2014)).

24 **B. The SLUSA Bar**

25 SLUSA was enacted “to prevent certain State private securities class action lawsuits
 26 alleging fraud from being used to frustrate the objectives” of the PSLRA — to curb
 27 “perceived abuses of the class-action vehicle in litigation involving nationally traded
 28 securities.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81, 86

(2006). The PSLRA's reforms — for example, imposing heightened pleading standards and a discovery stay (*see* 15 U.S.C. § 78u-4(b)(2)–(3)) — had the “unintended consequence” of plaintiffs avoiding federal court and “bringing class actions under state law, often in state court.” *Id.* at 82. To “stem this ‘shif[t] from Federal to State courts,” *id.*, SLUSA allows removal and dismissal of any class actions filed in state court asserting essentially securities-fraud claims that are disguised as state-law claims. SLUSA’s text provides a three-prong test for identifying such actions: “covered class action[s]” (prong 1), “based upon the statutory or common law of any State” (prong 2), and “alleging … an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security” (prong 3). 15 U.S.C. §§ 77p(b), 78bb(f)(1)–(2); *see also Madden v. Cowen & Co.*, 576 F.3d 957, 964 (9th Cir. 2009).

Consistent with SLUSA’s aim, the state-law claims falling within the SLUSA bar are typically those that are pursuable under Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”). *See In re Kingate Mgmt. Ltd. Litig.*, 784 F.3d 128, 146 (2d Cir. 2015) (“the history and the purposes of [SLUSA] all favor interpreting it to apply to state law claims … [that] would be subject to the PSLRA if pleaded as a private securities claim”). This is a sensible interpretation of the SLUSA bar given SLUSA’s purpose is to redirect such claims back to federal court, where they would be subject to the obstacles imposed by the PSLRA.

The SLUSA bar, however, was not meant to preclude class actions raising legitimate state-law claims that would not be cognizable under the Exchange Act. As the Supreme Court cautioned in *Troice*, an over-broad interpretation of SLUSA “would interfere with state efforts to provide remedies for victims of ordinary state-law frauds.” 571 U.S. at 391. Accordingly, in light of the “important role of state courts,” federal courts must “decline[] to construe federal jurisdictional statutes more expansively than their language, most fairly read.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016).

1 **V. ARGUMENT**

2 **A. The SLUSA Bar Is Inapplicable Because Plaintiff's Claims Do**
Not Depend on Deception or Misrepresentation

3 As the Supreme Court held in *Dabit*, SLUSA's preemptive reach is limited and stays
 4 clear of "historically entrenched state-law remed[ies]." *See* 547 U.S. at 88. Consistent with
 5 *Dabit*, the Ninth Circuit has repeatedly held that garden-variety common-law claims,
 6 such as negligence and breach of contract, fall outside SLUSA's ambit, even though the
 7 claims relate to the purchase or sale of a covered security, because the underlying conduct
 8 — breach of a duty or a promise — does not constitute a "misrepresentation." *See, e.g.*,
 9 *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1131–32 (9th Cir. 2002) ("[t]he breach of
 10 contract claims ... are not preempted by federal securities laws"). Put differently, the
 11 SLUSA bar applies only where "deceptive statements or conduct form the gravamen or
 12 essence of [plaintiff's] claim[s]." *Freeman Invs., L.P. v. Pac. Life Ins. Co.*, 704 F.3d 1110,
 13 1116 (9th Cir. 2013) (same).

14 In *Freeman*, for example, the Ninth Circuit held that the insureds' contract-based
 15 claims — breach of contract and breach of the duty of good faith and fair dealing — were
 16 not preempted by SLUSA because they were not prejudicated upon "deception or
 17 misrepresentation." *See id.* There, insureds brought a class action against the insurer
 18 alleging deceptive business practices involving variable universal life insurance policies,
 19 whose values were tied to investments in covered securities. *See id.* at 1113–14.
 20 Specifically, the insureds claimed that the insurer breached their policy terms by
 21 overcharging them for the "cost of insurance" — a term of art in the insurance industry.
 22 *Id.* at 1115. Arguing for the application of the SLUSA bar, the insureds latched onto the
 23 allegations of "systematic concealment" and "deceitful conduct" in the complaint. *See*
 24 *id.* Rejecting the insureds' argument as "formalistic," the Ninth Circuit "[s]tripped [the
 25 insureds' claim] to its essence" and found that no proof of deception was necessary for the
 26 insureds to prevail:

1 [The insureds] ... raise a dispute about the meaning of a key contract
 2 term, and the success of their claim will turn on whether they can convince
 3 the court or jury that theirs is the accepted meaning in the industry. ...

4 To succeed on this claim, plaintiffs need not show that [the insurer]
 5 misrepresented the cost of insurance or omitted critical details. They need
 6 only persuade the court that theirs is the better reading of the contract term.
 7 ... “[W]hile a contract dispute commonly involves a ‘*disputed truth*’ about
 8 the proper interpretation of the terms of a contract, *that does not mean one
 9 party omitted a material fact* by failing to anticipate, discover and disabuse
 10 the other of its contrary interpretation of a term in the contract.”

11 *Id.* at 1115 (internal citations omitted; emphases added). Refusing to “recast [these]
 12 contract claims as fraud claims,” the Ninth Circuit reasoned that:

13 Just as plaintiffs cannot avoid SLUSA through crafty pleading,
 14 *defendants may not recast contract claims as fraud claims* by arguing that
 15 they “really” *involve deception or misrepresentation*.

16 *Id.* (emphases added).

17 *Freeman*’s reasoning applies here. Just like the insureds in *Freeman*, Plaintiff
 18 alleges, in Count IV (breach of contract) and Count V (breach of the implied covenant of
 19 good faith and fair dealing), that Robinhood “promised one thing and delivered another.”
 20 *Id.* at 1118. Specifically, plaintiff claims that Robinhood “breached [the] Customer
 21 Agreements by ... failing to (a) provide the services promised; (b) maintain an adequate
 22 emergency plan; and (c) properly disclose the risks of outages and the occurrences of past
 23 outages.” ¶ 59. Nothing in these allegations even hints at deception or misrepresentation.
 24 As held in *Freeman*, plaintiff asserts “a straightforward contract claim” that “does not rest
 25 on misrepresentation or fraudulent omission.” See 704 F.3d at 1118. In fact, as a matter
 26 of California law, neither deception nor misrepresentation is an element of a breach-of-
 27 contract claim. See *First Commercial Mortg. Co. v. Reece*, 89 Cal. App. 4th 731, 744
 28 (2001) (“the elements of the cause of action are the existence of the contract, performance
 by the plaintiff or excuse for nonperformance, breach by the defendant and damages”).

29 Likewise, plaintiff’s claims for negligence (Count II), breach of fiduciary duty
 30 (Count III), unjust enrichment (Count VI), and declaratory relief (Count I) are not
 31 predicated upon deception or misrepresentation. See ¶¶ 40–56, 66–70. Indeed, plaintiff
 32 makes no allegations of deception or misrepresentation in those counts. See *id.* Nor is

1 plaintiff required to establish deception or misrepresentation to prevail on those counts.
 2 *See Toland v. Sunland Hous. Grp., Inc.*, 18 Cal. 4th 253, 267 (1998) (“A cause of action
 3 for ‘negligence’ [requires] ... : (1) a duty, or obligation, recognized by law; (2) a breach of
 4 the duty; (3) legal cause; and (4) actual loss or damage.”); *Stanley v. Richmond*, 35 Cal.
 5 App. 4th 1070, 1086 (1995) (“The elements of a cause of action for breach of fiduciary
 6 duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage
 7 proximately caused by the breach.”); *Lectrodryer v. Seoulbank*, 77 Cal. App. 4th 723, 726
 8 (2000) (“the elements for a claim of unjust enrichment: receipt of a benefit and unjust
 9 retention of the benefit at the expense of another”); *Brownfield v. Daniel Freeman
 10 Marina Hosp.*, 208 Cal. App. 3d 405, 410 (1989) (“A complaint for declaratory relief must
 11 demonstrate: (1) a proper subject of declaratory relief, and (2) an actual controversy
 12 involving justiciable questions relating to the rights or obligations of a party.”).

13 As for the two remaining counts under California’s consumer-protection statutes
 14 — the CLRA and the UCL — plaintiff does allege misrepresentations made by Robinhood
 15 regarding the quality of its online platform and the risks of its outages. *See ¶¶ 73, 79, 82.*
 16 For three reasons, however, these scant allegations do not alter “the gravamen or essence
 17 of” plaintiff’s nonfraud-based claims or transform them into fraud-based claims subject
 18 to the SLUSA bar. *See Freeman*, 704 F.3d at 1116.

19 First, plaintiff’s CLRA and UCL claims do not sound in fraud because, as the Ninth
 20 Circuit noted in *Vess v. Ciba-Geigy Corp. USA*, “[f]raud is not an essential element of a
 21 claim under these statutes.” 317 F.3d 1097, 1103 (9th Cir. 2003). This is especially so with
 22 regard to the UCL claim. Written in the disjunctive — “unlawful, unfair *or* fraudulent,”
 23 Section 17200 of the California Business and Professions Code prohibits not only
 24 “fraudulent” business practices, but also “unlawful” *or* “unfair” business practices. *See*
 25 CAL. BUS. & PROF. CODE § 17200 (emphasis added); *see also Berryman v. Merit Prop.
 26 Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007). Here, plaintiff expressly invokes the

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 28

1 “unfair” and “unlawful” prongs of the UCL. *See ¶¶ 78, 82–83.* As such, plaintiff’s claims
 2 fall outside the SLUSA bar.

3 Second, it is well settled that a party may plead alternative theories of liability, even
 4 if those theories are inconsistent or independently sufficient. *Cleveland v. Policy Mgmt.*
 5 *Sys. Corp.*, 526 U.S. 795, 805 (1999); *PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856,
 6 859 (9th Cir. 2007). As held in *Vess*, “plaintiff may choose not to allege a unified course
 7 of fraudulent conduct in support of a claim, but rather to allege some fraudulent and some
 8 non-fraudulent conduct.” *See* 317 F.3d at 1104. Here, in addition to alleging
 9 misrepresentation on the part of Robinhood, plaintiff also asserts claims that are free of
 10 any allegations of misrepresentation (e.g., negligence (Count II) and breach of contract
 11 (Count IV)). Misrepresentation or deceptive conduct does not form the gravamen of these
 12 non-fraud claims. *See Freeman*, 704 F.3d at 1116; *see also LaSala v. Bordier et Cie*, 519
 13 F.3d 121, 141 (3d Cir. 2008) (holding that SLUSA preemption cannot be based on
 14 extraneous allegations and would not apply to breach-of-fiduciary-duty claims unless an
 15 allegation of misrepresentation operates as a “factual predicate”).

16 Third, even if a complaint contains claims that are subject to the SLUSA bar, it does
 17 not necessarily follow that the remaining claims are also precluded. “SLUSA does not
 18 require the dismissal of non-precluded claims along with precluded claims.” *Proctor v.*
 19 *Vishay Intertechnology Inc.*, 584 F.3d 1208, 1227 (9th Cir. 2009). Because
 20 misrepresentation is not the gravamen of plaintiff’s nonfraud claims, at a minimum, those
 21 claims fall outside of the SLUSA bar’s purview. *See Freeman*, 704 F.3d at 1116–18
 22 (holding that SLUSA precludes some, but not all, of plaintiffs’ claims).

23 * * *

24 This action arises from Robinhood’s two-day-long system crashes — not “any
 25 manipulative or deceptive device” that is “designed to affect the price of a security
 26 artificially.” *See Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 940–41 (9th Cir. 2009).
 27 As held in *Fleming*, “trading system crash[es]” do not “involve manipulative conduct” and
 28 are thus out of SLUSA’s reach. *See* 878 F.3d at 1154. Thus, this Court should remand.

B. The SLUSA Bar Is Inapplicable Because Plaintiff's Claims Do Not Arise "in Connection with" the Purchase or Sale of a Covered Security

Even if a misrepresentation or omission is found to be a factual predicate of any claim, the SLUSA bar is applicable only if such misrepresentation or omission involves “a material fact in connection with the purchase or sale of a covered security.” See 15 U.S.C. §§ 77p(b), 78bb(f)(1)–(2); *see also Madden*, 576 F.3d at 964. As the Ninth Circuit has repeatedly recognized, although the “in-connection-with” requirement “must be read broadly,” it may not be interpreted “so broadly that the connection between a defendant’s conduct and the covered security becomes immaterial.” *Banks v. N. Trust Corp.*, 929 F.3d 1046, 1054 (9th Cir. 2019). Even before the Supreme Court put finer demarcation on the reach of the “in-connection-with” requirement in *Troice*, the Ninth Circuit has held that, to satisfy the requirement, there must be “more than some tangential relation” between the defendant’s fraud and the “securities transaction”:

While this [“in connection with”] language is capacious, *it doesn’t reach all transactions in which securities play a role, however incidental.* ... The fraud in question must relate to the nature of the securities, the risks associated with their purchase or sale, or some other factor with similar connection to the securities themselves. While *the fraud in question* need not relate to the investment value of the securities themselves, *it must have more than some tangential relation to the securities transaction.*

Freeman, 704 F.3d at 1116 (internal citations and quotation marks omitted; emphases added); *accord Spielman*, 332 F.3d at 123 (the “SLUSA bar” has a “broad, but not unlimited, scope”).

In its latest decision reading SLUSA’s scope, the Supreme Court fine-tuned the “in-connection-with” requirement in *Troice*. There, the Supreme Court refused to apply the SLUSA bar to the victims of Allen Stanford’s multibillion-dollar Ponzi scheme. *Troice*, 571 U.S. at 384–85. The victims alleged that they were induced by Stanford’s fraud to purchase “*uncovered* securities” that “defendants falsely told the victims ... were backed by *covered* securities.” *Id.* at 381 (emphases in original). In finding SLUSA inapplicable, the Supreme Court limited the scope of the “in-connection-with” requirement such that it “does not extend further” than “misrepresentations that are material to the purchase or

1 sale of a covered security.” *Id.* at 387. In other words, a misrepresentation is not “in
 2 connection with” such a ‘purchase or sale of a covered security’ unless it is material to a
 3 decision by one or more individuals (other than the fraudster) to buy or to sell a ‘covered
 4 security.’” *Id.* This “suggests a connection that matters” — that “the misrepresentation
 5 [must] make[] a significant difference to someone’s decision to purchase or to sell a
 6 covered security.” *Id.*

7 *Troice*’s interpretation of the “in-connection-with” requirement compels a finding
 8 that any misrepresentations or omissions on the part of Robinhood fall outside SLUSA’s
 9 reach. Plaintiff and the other class members are investors who had decided to purchase
 10 or sell securities before they signed up to use Robinhood’s services. *See ¶¶ 16, 24–36.* To
 11 the extent that Robinhood’s business practices amount to fraud, they were “material” or
 12 “ma[de] a significant difference to” plaintiff’s and other class members’ decisions to use
 13 Robinhood’s services. *See ¶ 81.* But they were *not* “material” to plaintiff’s and other class
 14 members’ decisions to purchase or sell any “covered securit[ies].”

15 The lack of connection between Robinhood and any purchases or sales of securities
 16 is borne out by the Customer Agreement between Robinhood and plaintiff and other class
 17 members.³ *See Chang Decl.*, Ex. A. In the Customer Agreement, Robinhood expressly
 18 disclaims any involvement or liability in a customer’s decision to invest in any security:

19 **5. Customer Representations and Responsibilities.**

20 **A. Self-directed Account.**

21 I understand that My Account is self-directed, and so that I am solely
 22 responsible for any and all orders placed in My Account and that all orders
 23 entered by Me or on My behalf are unsolicited and based on My own
 24 investment decisions Accordingly, I agree that *neither Robinhood nor*
 25 *any of its employees, agents, principals, or representatives:*

26 _____
 27 ³ The Customer Agreement is expressly referred to in the complaint (see ¶ 58) and
 28 is thus “[incorporated by reference] as part of the complaint.” *United States v. Ritchie*,
 342 F.3d 903, 908 (9th Cir. 2003). The relevant excerpts of the Robinhood Financial LLC
 & Robinhood Securities, LLC Customer Agreement (Revised April 28, 2020) are attached
 as Exhibit A (*available at* <https://cdn.robinhood.com/assets/robinhood/legal/Customer%20Agreement.pdf> (last visited June 26, 2020)) to the Declaration of Albert Y. Chang
 (“Chang Decl.”).

1. *provide investment advice* in connection with this Account;
2. *recommend any security, transaction or order;*
3. *solicit orders;*
4. *act as a market maker in any security;*
5. *make discretionary trades; and*
6. *produce or provide first-party research providing a specific investment strateg[y] such as buy, sell or hold recommendations, first-party ratings and/or price targets. ...*

8 Chang Decl., Ex. A at 5 (emphases added).

9 All told, any misrepresentations or omissions on the part of Robinson do not relate
10 to the nature of the securities, the risks associated with their purchase or sale, or some
11 other factor with similar connection to the securities themselves.” See *Falkowski*, 309
12 F.3d at 1130–31. Plaintiff and other class members’ *use of Robinson’s online services* is
13 the only connection between its “fraud” and any security transactions. Under *Troice* and
14 Circuit precedent, such “connection” is too tangential to satisfy the “in-connection-with”
15 requirement. See *Troice*, 571 U.S. at 387.

16 In sum, plaintiff’s state-law claims are not the result of artful pleading of securities-
17 fraud claims. They are far from garden-variety claims under Section 10(b) of the Exchange
18 Act, which are typically brought against publicly-traded corporations alleging fraudulent
19 inflation of stock price — by using a “manipulative or deceptive device” “in connection
20 with the purchase or sale of [the corporation’s] security.” See 15 U.S.C. § 78j(b). Rather,
21 this case involves a class of California-based customers of Robinhood — a brokerage firm
22 — and their online trading accounts with Robinhood. Plaintiff does not allege that
23 Robinhood induced him and other class members to purchase or sell a particular security
24 — or any security at all. Nor does plaintiff allege that Robinhood made any statements
25 regarding the price of any security. Rather, plaintiff claims that:

- 26 • Robinhood was negligent in failing to maintain its online trading system (see
27 ¶¶ 46–52);

- 1 • Robinhood breached its Customer Agreements, as well as other duties, by
2 causing massive system-wide outages for two days in March 2020 and by failing
3 to properly disclose the risks of outages (see ¶¶ 54–65); and
- 4 • Robinhood violated the CLRA and UCL by engaging in unfair and unlawful
5 business practices, such as touting itself “as a high-tech company with
6 ‘[e]xceptionally engineered systems” and promising customers “trad[ing] ‘in
7 [r]eal [t]ime” but failing to live up to those promises (see ¶¶ 25, 72–84).

8 To the extent that any misrepresentations or omissions form the basis of plaintiff’s claims,
9 they concern Robinhood and do not concern any “purchase or sale of [any] covered
10 security.” See 15 U.S.C. § 77p(b)(1). No stock price inflation resulted from any alleged
11 misrepresentations or omissions.

12 These facts set plaintiff’s case apart from the cases in which the Supreme Court
13 found the SLUSA bar to be applicable. Every one of those cases involved “victims who
14 took, who tried to take, who divested themselves of, who tried to divest themselves of, or
15 who maintained *an ownership interest* in [a covered security].” See *Toice*, 571 U.S. at
16 388 (emphasis in original). In every one of those cases, the misconduct pertained to the
17 purchase or sale or holding of particular securities — “purchases’ or ‘sales’ induced by
18 fraud.” *Id.* For example, in *Dabit*, the victims were holders of particular covered securities
19 that the defendants’ fraud caused to become overvalued. See 547 U.S. at 71. In *SEC v.*
20 *Zandford*, defendants sold customer’s securities and used proceeds from the sale of those
21 particular securities for his own benefit. See 535 U.S. 813, 822 (2002). In *The Wharf*
22 (*Holdings*) *Ltd. v. United International Holdings, Inc.*, the victims purchased an oral
23 option to buy a company’s stock that the company intended not to honor. See 532 U.S.
24 588, 589 (2001). In *United States v. O’Hagan*, the defendant used confidential
25 information to gain an advantageous market position in purchasing a company’s stock.
26 See 521 U.S. 642, 646 (1997). And, in *Superintendent of Insurance of New York v.*
27 *Bankers Life & Casualty Co.*, a company that authorized the sale of its treasury bonds was

1 “duped” into believing that the company would receive the proceeds of the sale. *See* 404
 2 U.S. 6, 9–10 (1971).

3 As the Supreme Court noted, “[e]very one of these cases ... concerned a false
 4 statement (or the like) that was ‘material’ to another individual’s decision” to purchase or
 5 sell a security. *Troice*, 571 U.S. at 393. In contrast, any misrepresentations or omissions
 6 alleged in this case — Robinhood’s false advertising of its online trading platform — did
 7 not “make[] a significant difference” and, in fact, any “difference to [plaintiff’s] decision
 8 to purchase or to sell a covered security.” *Id.* at 387–88. This is so because Robinhood’s
 9 false advertising induced only plaintiff and other class members to *use its online*
 10 *platform*. *See* ¶ 81 (alleging that had plaintiff and the class members known the truth of
 11 the risks of system outages, they “would not have registered for or used Robinhood’s
 12 services”). Robinhood did not — and plaintiff does not allege that Robinhood did — induce
 13 anyone to purchase or sell any security. *See id.* In fact, it is undisputed that plaintiff and
 14 other class members can trade financial instruments, such as cryptocurrency (¶ 3), that
 15 are not “covered securit[ies].” So, it cannot be said that any alleged misrepresentations or
 16 omissions here are made “in connection with the purchase or sale of a covered security.”
 17 *See* 15 U.S.C. § 77p(b)(1).

18 To hold otherwise would conflict with the limit imposed by *Troice* on the scope of
 19 the “in-connection-with” requirement. Such an impermissible expansion of SLUSA’s
 20 reach would not only deviate from SLUSA’s purpose of curbing securities-fraud class
 21 actions disguised in state-law claims, but would also “interfere with state efforts to
 22 provide remedies for victims of ordinary state-law frauds.” *Troice*, 571 U.S. at 391. It
 23 would also violate the “strong presumption” against removal. *See Gaus*, 980 F.2d at 566.
 24 No law — and Robinhood has cited none — allows this Court to apply the SLUSA bar to
 25 this case. The Court therefore must remand.

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28

1 **VI. CONCLUSION**

2 For the reasons set forth above, the Court should grant plaintiff's motion and
3 remand this action to the Superior Court of the State of California, County of San Mateo.

4 Dated: June 26, 2020

Respectfully submitted,

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